

***Information Item: Overview of US Supreme Court decision governing navigable waters in PPL Montana, LLC v. Montana, 132 S. Ct. 1215 (2012), and other more recent Indiana decisions***

In *PPL Montana, LLC v. Montana*, the US Supreme Court issued a landmark decision regarding the States' roles with respect to navigable waters. Jurisdiction and regulatory authority of the DNR and the Commission sometimes depend upon whether a watercourse is navigable. For examples, the DNR is the agency with "general charge of the navigable water of Indiana." IC 14-19-1-1(9). Licensure functions apply exclusively to navigable waters in IC 14-29-1-8 and 312 IAC 6. The information item overviews *PPL Montana* and two recent Indiana decisions.

*PPL Montana* is set forth below with case citations omitted. Factual aspects of the decision have unique application to the Missouri River in Montana, but language beginning at page 4 describes legal principles with significance for all States. *U.S. v. Carstens*, 2013 WL 6085970 (U.S. Dist Ct., N.D. Ind., 2013) and *LBLHA v. Town of Long Beach*, LaPorte Circuit Court, Cause No. 46C01-1212-PL-1941 (2013) apply to Lake Michigan. *Carstens* and *LBLHA* are attached. The latter is an unreported decision so precedential significance is limited mostly to the parties.

***PPL Montana, LLC v. Montana***

Justice KENNEDY delivered the opinion of the Court.

This case concerns three rivers which flow through Montana and then beyond its borders. The question is whether discrete, identifiable segments of these rivers in Montana were nonnavigable, as federal law defines that concept for purposes of determining whether the State acquired title to the riverbeds underlying those segments, when the State entered the Union in 1889. Montana contends that the rivers must be found navigable at the disputed locations. From this premise, the State asserts that in 1889 it gained title to the disputed riverbeds under the constitutional equal-footing doctrine. Based on its title claims, Montana sought compensation from PPL Montana, LLC, a power company, for its use of the riverbeds for hydroelectric projects. The Montana courts granted summary judgment on title to Montana, awarding it \$41 million in rent for the riverbeds for the period from 2000 to 2007 alone. That judgment must be reversed.

**I**

The three rivers in question are the Missouri River, the Madison River, and the Clark Fork River. The Missouri and the Madison are on the eastern side of the Continental Divide. The Madison flows into the Missouri, which then continues at length to its junction with the Mississippi River. The Clark Fork River is on the western side of the Continental Divide. Its waters join the Columbia River system that flows into the Pacific Ocean. Each river shall be described in somewhat more detail.

**A**

The Missouri River originates in Montana and traverses seven States before a point just north of St. Louis where it joins the Mississippi. If considered with the continuous path formed by certain streams that provide the Missouri River's headwaters, the Missouri is over 2,500 miles long, the longest river in the United States. The Missouri River's basin (the land area drained by the river) is the second largest in the Nation, surpassed only by the Mississippi River basin of which it is a part. As a historical matter, the river shifted and flooded often, and contained many sandbars, islands, and unstable banks. The river was

once described as one of the most "variable beings in creation," as "inconstant [as] the action of the jury," *Sioux City Register* (Mar. 28, 1868); and its high quantity of downstream sediment flow spawned its nickname, the "Big Muddy"....

The upstream part of the Missouri River in Montana, known as the Upper Missouri River, is better characterized as rocky rather than muddy. While one usually thinks of the Missouri River as flowing generally south, as indeed it does beginning in North Dakota, the Upper Missouri in Montana flows north from its principal headwaters at Three Forks, which is located about 4,000 feet above sea level in the Rocky Mountain area of southwestern Montana. It descends through scenic mountain terrain including the deep gorge at the Gates of the Mountains; turns eastward through the Great Falls reach, cascading over a roughly 10-mile stretch of cataracts and rapids over which the river drops more than 400 feet; and courses swiftly to Fort Benton, a 19th-century fur trading post, before progressing farther east into North Dakota and on to the Great Plains. In 1891, just after Montana became a State, the Upper Missouri River above Fort Benton was "seriously obstructed by numerous rapids and rocks," and the 168-mile portion flowing eastward "[f]rom Fort Benton to Carroll, Mont., [was] called the rocky river..."

The Great Falls exemplify the rocky, rapid character of the Upper Missouri. They consist of five cascade-like waterfalls located over a stretch of the Upper Missouri leading downstream from the city of Great Falls in midwestern Montana. The waterfall farthest downstream, and the one first encountered by Meriwether Lewis and William Clark when they led their remarkable expedition through the American West in 1805, is the eponymous "Great Falls," the tallest of the five falls at 87 feet. Lewis recorded observations of this "sublimely grand spectacle":

[T]he whole body of water passes with incredible swiftness. . . . over a precipice of at least eighty feet. . . . [T]he irregular and somewhat projecting rocks below receives the water . . . and brakes it into a perfect white foam which assumes a thousand forms in a moment sometimes flying up in jets . . . [that] are scarcely formed before large rolling bodies of the same beaten and foaming water is thrown over and conceals them. . . . [T]he [rainbow] reflection of the sun on the spray or mist . . . adds not a little to the beauty of this majestically grand senery.

If one proceeds alongside the river upstream from Great Falls, as Lewis did in scouting the river for the expedition, the other four falls in order are "Crooked Falls" (19 feet high); "Rainbow Falls" (48 feet), which Lewis called "one of the most bea[u]tifull objects in nature"; "Colter Falls" (7 feet), and "Black Eagle Falls" (26 feet). Despite the falls' beauty, Lewis could see that their steep cliffs and swift waters would impede progress on the river, which had been the expedition's upstream course for so many months. The party proceeded over a more circuitous land route by means of portage, circumventing the Great Falls and their surrounding reach of river before returning to travel upon the river about a month later.

The Upper Missouri River, both around and further upstream of the Great Falls, shares the precipitous and fast-moving character of the falls themselves. As it moves downstream over the Great Falls reach, a 17-mile stretch that begins somewhat above the head of Black Eagle Falls, the river quickly descends about 520 feet in elevation, dropping over 400 feet within 10 miles from the first rapid to the foot of Great Falls, Parker, Black Eagle Falls Dam. In 1879, that stretch was a "constant succession of rapids and falls." Lewis noted the water was so swift over the area that buffalo were swept over the cataracts in "considerable quantities" and were "instantly crushed." Well above the Great Falls reach, the Stubbs Ferry stretch of the river from Helena to Cascade also had steep gradient and was "much obstructed by rocks and dangerous rapids."

**B**

The second river to be considered is the Madison, one of the Missouri River's headwater tributaries. Named by Lewis and Clark for then-Secretary of State James Madison, the Madison River courses west out of the Northern Rocky Mountains of Wyoming and Montana in what is now Yellowstone National Park, then runs north and merges with the Jefferson and Gallatin Rivers at Three Forks, Montana, to form the Upper Missouri. Along its path, the Madison River flows through two lakes artificially created by dams built in canyons: Hebgen Lake and Ennis Lake.

**C**

The third river at issue in this case is the Clark Fork. That river, which consists in large part of "long, narrow streams confined by mountainous terrain," rises at an elevation of about 5,000 feet in the Silver Bow Mountains of southwestern Montana. The river flows northward for about 40 miles; turns northwest for a stretch; then turns abruptly northeast for a short stint, by which time it has descended nearly 2,500 feet in altitude. It then resumes a north-westward course until it empties into Lake Pend Oreille in northern Idaho, out of which flows a tributary to the Columbia River of the Pacific Northwest. The Clark Fork is "one of the wildest and most picturesque streams in the West," marked by "many waterfalls and boxed gorges."

Lewis and Clark knew of the Clark Fork River but did not try to navigate it, in part because the absence of salmon in one of its tributaries made Lewis believe "there must be a considerable fall in [the river] below." This was correct, for shortly before the Clark Fork exits to Idaho from the northwest corner of Montana, "the waters of the river dash madly along their rocky bed," dropping over 30 feet in a half-mile as they rush over falls and rapids including a "foaming waterfall" now known as Thompson Falls.

**II**

Petitioner PPL Montana, LLC (PPL), owns and operates hydroelectric facilities that serve Montana residents and businesses. Ten of its facilities are built upon riverbeds underlying segments of the Upper Missouri, Madison, and Clark Fork Rivers. It is these beds to which title is disputed.

On the Upper Missouri River, PPL has seven hydroelectric dams. Five of them are along the Great Falls reach, including on the three tallest falls; and the other two are in canyons upstream on the Stubbs Ferry stretch. On the Madison River, two hydroelectric dams are located in steep canyons. On the Clark Fork River, a hydroelectric facility is constructed on the Thompson Falls.

The dams on the Upper Missouri and Madison are called the Missouri-Madison project. The Thompson Falls facility is called the Thompson Falls project. Both projects are licensed by the Federal Energy Regulatory Commission. PPL acquired them in 1999 from its predecessor, the Montana Power Company.

PPL's power facilities have existed at their locations for many decades, some for over a century. See Robison, *supra*, at 40 (Black Eagle Falls dam constructed by 1891). Until recently, these facilities were operated without title-based objection by the State of Montana. The State was well aware of the facilities' existence on the riverbeds—indeed, various Montana state agencies had participated in federal licensing proceedings for these hydroelectric projects. Yet the State did not seek, and accordingly PPL and its predecessor did not pay, compensation for use of the riverbeds. Instead, the understanding of PPL and the United States is that PPL has been paying rents to the United States for use of those riverbeds, as well as for use of river uplands flooded by PPL's projects.

In 2003, parents of Montana schoolchildren sued PPL in the United States District Court for the District of Montana, arguing that PPL had built its facilities on riverbeds that were state owned and part of Montana's school trust lands. Prompted by the litigation, the State joined the lawsuit, for the first time

seeking rents for PPL's riverbed use. The case was dismissed in September 2005 for lack of diversity jurisdiction.

PPL and two other power companies sued the State of Montana in the First Judicial District Court of Montana, arguing that the State was barred from seeking compensation for use of the riverbeds. By counterclaim, the State sought a declaration that under the equal-footing doctrine it owns the riverbeds used by PPL and can charge rent for their use. The Montana trial court granted summary judgment to Montana as to navigability for purposes of determining riverbed title. The court decided that the State owned the riverbeds. The court ordered PPL to pay \$40,956,180 in rent for use of the riverbeds between 2000 and 2007. Whether a lease for future periods would commence, and, if so, at what rental rate, seems to have been left to the discretion of the Montana Board of Land Commissioners.

In a decision by a divided court, the Montana Supreme Court affirmed. The court reasoned from the background principle that "navigability for title purposes is very liberally construed." It dismissed as having "limited applicability" this Court's approach of assessing the navigability of the disputed segment of the river rather than the river as a whole. The Montana court accepted that certain relevant stretches of the rivers were not navigable but declared them "merely short interruptions" insufficient as a matter of law to find nonnavigability, since traffic had circumvented those stretches by overland portage. Placing extensive reliance upon evidence of present-day use of the Madison River, the court found that river navigable as a matter of law at the time of statehood.

Justice Rice dissented. He stated that "courts are not to assume an *entire river* is navigable merely because certain reaches of the river are navigable." The majority erred, he wrote, in rejecting the "section-by-section approach" and "declaring, as a matter of law, that the reaches claimed by PPL to be non-navigable are simply too 'short' to matter," when in fact PPL's evidence showed the "disputed reaches of the rivers were, at the time of statehood, non-navigable."

This Court granted certiorari...and now reverses the judgment.

### III

#### A

PPL contends the opinion of the Montana Supreme Court is flawed in three respects: first, the court's failure to consider with care the navigability of the particular river segments to which title is disputed, and its disregard of the necessary overland portage around some of those segments; second, its misplaced reliance upon evidence of present-day, recreational use; and third, what the state court itself called its liberal construction of the navigability test, which did not place the burden of proof upon the State to show navigability. The United States as *amicus* is in substantial agreement with PPL's arguments, although it offers a more extended discussion with respect to evidence of present-day, recreational use.

It is appropriate to begin the analysis by discussing the legal principles that control the case.

#### B

The rule that the States, in their capacity as sovereigns, hold title to the beds under navigable waters has origins in English common law. A distinction was made in England between waters subject to the ebb and flow of the tide (royal rivers) and nontidal waters (public highways). With respect to royal rivers, the Crown was presumed to hold title to the riverbed and soil, but the public retained the right of passage and the right to fish in the stream. With respect to public highways, as the name suggests, the public also retained the right of water passage; but title to the riverbed and soil, as a general matter, was held in private ownership. Riparian landowners shared title, with each owning from his side to the center thread of the stream, as well as the exclusive right to fish there.

While the tide-based distinction for bed title was the initial rule in the 13 Colonies, after the Revolution American law moved to a different standard. Some state courts came early to the conclusion that a State holds presumptive title to navigable waters whether or not the waters are subject to the ebb and flow of the tide. The tidal rule of "navigability" for sovereign ownership of riverbeds, while perhaps appropriate for England's dominant coastal geography, was ill suited to the United States with its vast number of major inland rivers upon which navigation could be sustained. By the late 19th century, the Court had recognized "the now prevailing doctrine" of state sovereign "title in the soil of rivers really navigable. ("In this country, as a general thing, all waters are deemed navigable which are really so"). This title rule became known as "navigability in fact."

The rule for state riverbed title assumed federal constitutional significance under the equal-footing doctrine. In 1842, the Court declared that for the 13 original States, the people of each State, based on principles of sovereignty, "hold the absolute right to all their navigable waters and the soils under them," subject only to rights surrendered and powers granted by the Constitution to the Federal Government. In a series of 19th-century cases, the Court determined that the same principle applied to States later admitted to the Union, because the States in the Union are coequal sovereigns under the Constitution. These precedents are the basis for the equal-footing doctrine, under which a State's title to these lands was "conferred not by Congress but by the Constitution itself." It follows that any ensuing questions of navigability for determining state riverbed title are governed by federal law.

The title consequences of the equal-footing doctrine can be stated in summary form: Upon statehood, the State gains title within its borders to the beds of waters then navigable (or tidally influenced, although that is not relevant in this case). It may allocate and govern those lands according to state law subject only to "the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses.

Returning to the "navigability in fact" rule, the Court has explained the elements of this test. A basic formulation of the rule was...:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds. It has been used as well to determine questions of title to water beds under the equal-footing doctrine.

It should be noted, however, that the test for navigability is not applied in the same way in these distinct types of cases.

Among the differences in application are the following. For state title under the equal-footing doctrine, navigability is determined at the time of statehood, and based on the "natural and ordinary condition" of the water. In contrast, admiralty jurisdiction extends to water routes made navigable even if not formerly so, (artificial canal); and federal regulatory authority encompasses waters that only recently have become navigable, were once navigable but are no longer, or are not navigable and never have been but may become so by reasonable improvements. With respect to the federal commerce power, the inquiry regarding navigation historically focused on interstate commerce. And, of course, the commerce power

extends beyond navigation. In contrast, for title purposes, the inquiry depends only on navigation and not on interstate travel. This list of differences is not exhaustive. Indeed, "[e]ach application of [the *Daniel Ball*] test . . . is apt to uncover variations and refinements which require further elaboration."

#### IV

##### A

The primary flaw in the reasoning of the Montana Supreme Court lies in its treatment of the question of river segments and overland portage.

To determine title to a riverbed under the equal-footing doctrine, this Court considers the river on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not. In *United States v. Utah*, for example, the Court noted, "the controversy relates only to the sections of the rivers which are described in the complaint, and the Master has limited his findings and conclusions as to navigability accordingly. The propriety of this course, in view of the physical characteristics of the streams, is apparent. Even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, how far navigability extends."

The Court went on to conclude, after reciting and assessing the evidence, that the Colorado River was navigable for its first roughly 4-mile stretch, nonnavigable for the next roughly 36-mile stretch, and navigable for its remaining 149 miles. The Court noted the importance of determining "the exact point at which navigability may be deemed to end."

Similarly, the Court examined the segment of the Arkansas River that ran along the Osage Indian Reservation, assessing whether the Arkansas River was "navigable in fact at the *locus in quo*." The Court concluded that the United States originally, and the Osages as its grantees, unequivocally held title to the riverbeds because the Arkansas River "is and was not navigable at the place where the river bed lots, here in controversy, are." The Court found the segment of river along the reservation to be nonnavigable even though a segment of the river that began further downstream was navigable (noting that "how far up the streams navigability extended was not known"; assessing separately the segments of the Red River above and below its confluence with the Washita River within Oklahoma's borders; and concluding that neither segment, and hence "no part of the river within Oklahoma," was navigable).

The Montana Supreme Court discounted the segment-by-segment approach of this Court's cases, calling it "a piecemeal classification of navigability—with some stretches declared navigable, and others declared non-navigable." This was error. The segment-by-segment approach to navigability for title is well settled, and it should not be disregarded. A key justification for sovereign ownership of navigable riverbeds is that a contrary rule would allow private riverbed owners to erect improvements on the riverbeds that could interfere with the public's right to use the waters as a highway for commerce. While the Federal Government and States retain regulatory power to protect public navigation, allocation to the State of the beds underlying navigable rivers reduces the possibility of conflict between private and public interests. By contrast, segments that are nonnavigable at the time of statehood are those over which commerce could not then occur. Thus, there is no reason that these segments also should be deemed owned by the State under the equal-footing doctrine.

Practical considerations also support segmentation. Physical conditions that affect navigability often vary significantly over the length of a river. This is particularly true with longer rivers, which can traverse vastly different terrain and the flow of which can be affected by varying local climates. The Missouri River provides an excellent example: Between its headwaters and mouth, it runs for over 2,000 miles out of steep mountains, through canyons and upon rocky beds, over waterfalls and rapids, and across sandy plains, capturing runoff from snow melt and farmland rains alike. These shifts in physical conditions

provide a means to determine appropriate start points and end points for the segment in question. Topographical and geographical indicators may assist.

A segment approach to riverbed title allocation under the equal-footing doctrine is consistent with the manner in which private parties seek to establish riverbed title. For centuries, where title to the riverbed was not in the sovereign, the common-law rule for allocating riverbed title among riparian landowners involved apportionment defined both by segment (each landowner owns bed and soil along the length of his land adjacent) and thread (each landowner owns bed and soil to the center of the stream).

Montana, moreover, cannot suggest that segmentation is inadministrable when the state courts managed to divide up and apportion the underlying riverbeds for purposes of determining their value and the corresponding rents owed by PPL.

The Montana Supreme Court, relying upon *Utah*, decided that the segment-by-segment approach is inapplicable here because it "does not apply to 'short interruption[s]' of navigability in a stream otherwise navigable." This was mistaken. In *Utah*, this Court noted in passing that the facts of the case concerned "long reaches with particular characteristics of navigability or non-navigability" rather than "short interruption[s]." The Court in *Utah* did not say the case would have a different outcome if a "short interruption" were concerned.

Even if the law might find some nonnavigable segments so minimal that they merit treatment as part of a longer, navigable reach for purposes of title under the equal-footing doctrine, it is doubtful that any of the segments in this case would meet that standard, and one—the Great Falls reach—certainly would not. As an initial matter, the kinds of considerations that would define a *de minimis* exception to the segment-by-segment approach would be those related to principles of ownership and title, such as inadministrability of parcels of exceedingly small size, or worthlessness of the parcels due to overdivision. An analysis of segmentation must be sensibly applied. A comparison of the nonnavigable segment's length to the overall length of the stream, for instance, would be simply irrelevant to the issue at hand.

A number of the segments at issue here are both discrete, as defined by physical features characteristic of navigability or nonnavigability, and substantial, as a matter of administrability for title purposes. This is best illustrated by the Great Falls reach, which is 17 miles long and has distinct drops including five waterfalls and continuous rapids in between. There is plenty of reason to doubt that reach's navigability based on the presence of the series of falls. There is also reason to think that title to that segment of bed would not be worthless or inadministrable. Indeed, the State sought and was awarded rent in the amount of \$41 million for PPL's various hydroelectric facilities attached to the riverbeds, half of which are along the Great Falls reach.

Applying its "short interruptions" approach, the Montana Supreme Court decided that the Great Falls reach was navigable because it could be managed by way of land route portage. The court noted in particular the portage of Lewis and Clark's expedition. Yet that very portage reveals the problem with the Montana Supreme Court's analysis. Leaving behind their larger boats, Lewis and Clark transported their supplies and some small canoes about 18 miles over land, which took at least 11 days and probably more. Even if portage were to take travelers only one day, its significance is the same: it demonstrates the need to bypass the river segment, all because that part of the river is nonnavigable. Thus, the Montana Supreme Court was wrong to state, with respect to the Great Falls reach and other stretches of the rivers in question, that portages "are not sufficient to defeat a finding of navigability." In most cases, they are, because they require transportation over land rather than over the water. This is such a case, at least as to the Great Falls reach.

In reaching its conclusion that the necessity of portage does not undermine navigability, the Montana Supreme Court misapplied this Court's decision in *The Montello*, 20 Wall. 430. The consideration of portage in *The Montello* was for a different purpose. The Court did not seek to determine whether the river in question was navigable for title purposes but instead whether it was navigable for purposes of determining whether boats upon it could be regulated by the Federal Government. The primary focus in *The Montello* was not upon navigability in fact but upon whether the river was a "navigable water of the United States." The latter inquiry is doctrinally distinct. It turns upon whether the river "forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other States or foreign countries in the customary modes in which such commerce is conducted by water." It is language similar to "continued highway" that Montana urges the Court to import into the title context in lieu of the Court's established segmentation approach. Brief for Respondent 42-43, n. 16.

*The Montello* reasonably concluded that the portages required in that case did not prevent the river from being part of a channel of interstate commerce. Portages continued that channel because goods could be successfully transported interstate, in part upon the waters in question. This provided sufficient basis to regulate steamboats at places where those boats could and did, in fact, navigate portions of the river. Here, by contrast, the question regards ownership of the bed under river segments that the Montana Supreme Court, by calling them "interruptions in the navigation," acknowledges were nonnavigable. The reasoning and the inquiry of *The Montello* does not control the outcome where the quite different concerns of the riverbed title context apply.

Having clarified that portages may defeat navigability for title purposes, and do so with respect to the Great Falls reach, the Court sees no evidence in the record that could demonstrate that the Great Falls reach was navigable. Montana does not dispute that overland portage was necessary to traverse that reach. Indeed, the State admits "the falls themselves were not passable by boat at statehood." And the trial court noted the falls had never been navigated. Based on these statements, this Court now concludes, contrary to the Montana Supreme Court's decision, that the 17-mile Great Falls reach, at least from the head of the first waterfall to the foot of the last, is not navigable for purposes of riverbed title under the equal-footing doctrine.

This Court also determines, based on evidence in the record, that there is a significant likelihood that some of the other river stretches in dispute also fail the federal test of navigability for the purpose of determining title. For example, as to the disputed segment of the Clark Fork River, the Montana Supreme Court incorrectly stated the sole evidence for nonnavigability "consists of conclusory statements. . . without any specific factual support." In fact, PPL introduced a report of the U.S. Army Corps of Engineers from 1891, two years after Montana's date of statehood, documenting that the portion of the Clark Fork river between Missoula and Lake Pend Oreille (which includes the location of PPL's Thompson Falls facility) had a fall of about 1,100 feet in 250 miles and "is a mountain torrential stream, full of rocks, rapids, and falls, . . . utterly unnavigable, and incapable of being made navigable except at an enormous cost." The report based its conclusions on various failed attempts to navigate the river. It found the Thompson Falls "a complete obstruction to navigation" and the river around that area "exceedingly rapid, rough, and full of rocks." This was consistent with a 1910 Federal District Court decree. The decree adjudicated a title dispute between two private parties over the riverbed near and under Thompson Falls and declared the river at that place "was and is a non-navigable stream incapable of carrying the products of the country in the usual manner of water transportation." While the ultimate decision as to this and the other disputed river stretches is to be determined, in the first instance, by the Montana courts upon remand, the relevant evidence should be assessed in light of the principles discussed in this opinion.



**B**

The Montana Supreme Court further erred as a matter of law in its reliance upon the evidence of present-day, primarily recreational use of the Madison River. Error is not inherent in a court's consideration of such evidence, but the evidence must be confined to that which shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood. Navigability must be assessed as of the time of statehood, and it concerns the river's usefulness for "trade and travel," rather than for other purposes. Mere use by initial explorers or trappers, who may have dragged their boats in or alongside the river despite its nonnavigability in order to avoid getting lost, or to provide water for their horses and themselves, is not itself enough.

True, river segments are navigable not only if they "[were] used," but also if they "[were] susceptible of being used," as highways of commerce at the time of statehood. [...] Evidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use at the time of statehood. ("[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation"); (fact that actual use has "been more of a private nature than of a public, commercial sort. . . cannot be regarded as controlling"). Similarly, poststatehood evidence, depending on its nature, may show susceptibility of use at the time of statehood. ("[E]xtensive and continued [historical] use for commercial purposes" may be the "most persuasive" form of evidence, but the "crucial question" is the potential for such use at the time of statehood, rather than "the mere manner or extent of actual use").

Evidence of present-day use may be considered to the extent it informs the historical determination whether the river segment was susceptible of use for commercial navigation at the time of statehood. For the susceptibility analysis, it must be determined whether trade and travel could have been conducted "in the customary modes of trade and travel on water," over the relevant river segment "in [its] natural and ordinary condition." At a minimum, therefore, the party seeking to use present-day evidence for title purposes must show: (1) the watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and (2) the river's poststatehood condition is not materially different from its physical condition at statehood (finding that scientific and historical evidence showed that the physical condition of particular water bodies had not varied substantially since statehood in a way that might affect navigation). If modern watercraft permit navigability where the historical watercraft would not, or if the river has changed in ways that substantially improve its navigability, then the evidence of present-day use has little or no bearing on navigability at statehood.

The Montana Supreme Court opinion offered no indication that it made these necessary findings. The court concluded the evidence of present-day use of the Madison was probative of its susceptibility of use at statehood, but there is no apparent basis for its conclusion. The court did not find the watercraft similar to those used at the time of statehood, and the State's evidence of present-day use for recreational fishing did not indicate what types of boats are now used. Modern recreational fishing boats, including inflatable rafts and lightweight canoes or kayaks, may be able to navigate waters much more shallow or with rockier beds than the boats customarily used for trade and travel at statehood.

As to the river's physical condition, the Montana Supreme Court did not assess with care PPL's evidence about changes to the river's flow and the location and pattern of its channel since statehood. The affidavit of PPL's expert in fluvial geomorphology—the study of river-related landforms—at least suggests that as a result of PPL's dams, the river has become "less torrential" in high flow periods and less shallow in low flow periods. Thus, the river may well be easier to navigate now than at statehood.

The Montana Supreme Court altogether ignored the expert's reasoning about the past condition of the river's channels and the significance of that information for navigability. Further, contrary to the Montana Supreme Court's suggestion, the expert's affidavit was not mere evidence of change in "seasonal

variations" of water depth. It provided meaningful evidence that the river's conditions had changed since statehood in ways that made present-day navigation of the river easier in all seasons than it was at the relevant time. While the Montana court was correct that a river need not be susceptible of navigation at every point during the year, neither can that susceptibility be so brief that it is not a commercial reality. Against this background, the present-day recreational use of the river did not bear on navigability for purposes of title under the equal-footing doctrine. The Montana Supreme Court's reliance upon the State's evidence of present-day, recreational use, at least without further inquiry, was wrong as a matter of law.

### C

The above analysis is sufficient to require reversal of the grant of summary judgment to Montana. Therefore, the Court declines to decide whether the Montana Supreme Court further erred as to the burden of proof regarding navigability.

### D

As a final contention, the State of Montana suggests that denying the State title to the riverbeds here in dispute will undermine the public trust doctrine, which concerns public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses. This suggestion underscores the State's misapprehension of the equal footing and public trust doctrines.

The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country. Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law, subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.

### V

As the litigation history of this case shows, Montana filed its claim for riverbed rent over a century after the first of the dams was built upon the riverbeds. Montana had not sought compensation before then, despite its full awareness of PPL's hydroelectric projects and despite the State's own participation in the projects' federal licensing process. While this Court does not reach the question, it may be that by virtue of the State's sovereignty, neither laches nor estoppel could apply in a strict sense to bar the State's much belated claim. Still, the reliance by PPL and its predecessors in title upon the State's long failure to assert title is some evidence to support the conclusion that the river segments were nonnavigable for purposes of the equal-footing doctrine.

The Montana Supreme Court's ruling that Montana owns and may charge for use of riverbeds across the State was based upon an infirm legal understanding of this Court's rules of navigability for title under the equal-footing doctrine. As the Court said in *Brewer-Elliott*, "It is not for a State by courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability which . . . would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked." [...]

\* \* \*

The judgment of the Montana Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. *It is so ordered.*

***U.S. v. Carstens*, ---- F.Supp.2d ---- (2013)**

2013 WL 6085970

Only the Westlaw citation is currently available.

United States District Court,  
N.D. Indiana,  
Hammond Division.

UNITED STATES of America,

v.

Robert M. CARSTENS, Jr.

Nos. 3111101, 3111102, 3111103. | Nov. 20, 2013.

### Synopsis

**Background:** Defendant was charged by citation issued by National Park Service (NPS) rangers with operating a vehicle off designated route and launching a water craft at an unauthorized launch site at Indiana Dunes National Lakeshore. Following the government's presentation of evidence at bench trial, defendant moved for judgment of acquittal.

[Holding:] The District Court, Paul R. Cherry, United States Magistrate Judge, held that NPS had jurisdiction to regulate the beach area where defendant's alleged violations occurred.

Motion denied.

West Headnotes (3)

### [1] Criminal Law

⇒ Suspicion or conjecture; reasonable doubt

### Criminal Law

⇒ Hearing and determination

In determining, on motion for judgment of acquittal, whether the government's evidence is insufficient to sustain a conviction, the court is to view the evidence in a light most favorable to the government and determine whether a rational trier of fact could have found the essential elements established beyond a reasonable doubt.

### [2] Water Law

⇒ Power to control and regulate

Navigable waters in the United States are under the exclusive control of the federal government.

### [3] United States

⇒ Control, regulation, and use of public property, buildings, and places

### Water Law

⇒ Use of shores or banks

### Water Law

⇒ Public trust

### Water Law

⇒ Ordinary high water line or mark in general

National Park Service (NPS) had jurisdiction to regulate the beach area in Indiana Dunes National Lakeshore between the toe of the sand dunes, which was also the Lake Michigan ordinary high water mark, and the edge of Lake Michigan's water, and thus NPS rangers had legal authority to enforce federal regulations against defendant, and issue violation citations against him for operating a vehicle off designated route and launching a water craft at an unauthorized launch site within that beach area; beach area was not owned by any person, entity, or municipality, and it was land held in the public trust by the State of Indiana. National Park System General Authorities Act, § 3(h), 16 U.S.C.A. § 1a-2(h); 36 C.F.R. §§ 3.8, 4.10.

### Attorneys and Law Firms

Assistant United States Attorneys Nicholas Padilla, Dean Lanter, and Joseph Reid, Attorneys for the United States of America.

Scott King, Attorney for Defendant Robert M. Carstens, Jr.

### Opinion

### OPINION AND ORDER

PAUL R. CHERRY, United States Magistrate Judge.

\*1 On July 26, 2013, the United States of America appeared by counsel Assistant United States Attorneys Nicholas Padilla and Dean Lanter. Defendant Robert M. Carstens, Jr. appeared in person and by counsel Scott King.

A Bench Trial was begun on three violation citations issued on March 21, 2012, by the United States Department of Interior National Park Service against Defendant Robert M. Carstens, Jr. The U.S. Government presented evidence in its case-in-chief, then rested its presentation of evidence.

The parties agree that the primary issue in these combined matters is jurisdictional—whether the National Park Service Rangers had legal authority to enforce federal regulations against Carstens, and issue violation citations against him, given the locations where the alleged violations took place.

Prior to the presentation of evidence by Defendant Carstens in his case-in-chief, the parties agreed, and the Court ordered, that Carstens be permitted to file a written Motion For Judgment Of Acquittal with briefing to follow. On September 13, 2013, Carstens filed his Defendant's Motion For Acquittal. On October 18, 2013, the United States Government filed its Amended Response Of United States To Defendant's Motion To Dismiss At The Close Of The Government's Case. The Court ordered that no reply be filed.

In determination of the issues the Court FINDS, ORDERS, ADJUDGES, and DECREES:

#### PROCEDURAL HISTORY

1. On March 21, 2012, the United States of America Department of Interior National Park Service issued three citations to Defendant Robert M. Carstens, Jr., alleging the following violations of federal law:

- 1) Citation 3111101—Operating A Vehicle Off Designated Route;
- 2) Citation 3111102—Launching A Water Craft At An Unauthorized Launch Site;
- 3) Citation 3111103—Operating A Personal Water Craft Where Prohibited (not in issue for purposes of the Defendant's Motion For Acquittal).

2. On June 15, 2012, an Initial Appearance was held at which Carstens pled not guilty to the three charges.

3. On June 14, 2013, a Bench Trial was scheduled for July 26, 2013.

4. On July 26, 2013, a Bench Trial was begun. The United States Government presented evidence, then rested. Upon close of the Government's presentation of evidence, the parties agreed, and the Court ordered, that Carstens be permitted to file a written Motion For Judgment Of Acquittal, with briefing to follow, and with the Bench Trial to be in recess until ruling on the Motion.

5. On September 13, 2013, Carstens filed his Defendant's Motion For Acquittal as to Citations 3111101 and 3111102.

6. On October 17, 2013, the Government filed its Response of United States to Defendant's Motion to Dismiss at the Close of the Government's Case; on October 18, 2013, the Government filed its Amended Response (correcting a typographical error).

7. No reply brief was permitted by the Court.

#### STANDARD OF REVIEW

8. Federal Rule of Criminal Procedure 29(a) provides, in part: "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."

\*2 9. The standard of review in this case is whether the government's evidence is insufficient to sustain a conviction.

[1] 10. In making this determination, the court is to view the evidence in a light most favorable to the Government and determine whether a rational trier of fact could have found the essential elements established beyond a reasonable doubt. *United States v. Pree*, 408 F.3d 855, 865 (7th Cir.2005).

#### FINDINGS OF FACT

11. The Indiana Dunes National Lakeshore (the "Park") is a national park, about 15,000 acres in size, located in far northern Indiana along the shore of Lake Michigan; it is operated by the United States Department of Interior National Park Service ("National Park Service").

12. The Town of Dune Acres, Indiana, is a small residential community located in far northern Indiana close by the shore of Lake Michigan; it is geographically surrounded by the Park and Lake Michigan shoreline and beach.

13. Robert M. Carstens, Jr. is a resident of the Town of Dune Acres; on behalf of the Town of Dune Acres as the Town's "Beach Commissioner," Carstens from time to time issues permits to the Town of Dune Acres residents to launch personal water craft from the beach and operate personal water craft in the nearby Lake Michigan water.

14. The Park follows the National Park Service regulations prohibiting operation of vehicles on a park beach and operation of personal water craft in park waters.

15. In both 2010 and 2011, Michael Bremer, the Park's Chief Ranger, told Carstens (and sometimes other people) that the operation of vehicles was not allowed on the beach near the Town of Dune Acres and the operation of personal water craft was not allowed in the nearby water of Lake Michigan at any point on the water within 300 feet of the edge of the water.

16. On or about March 12, 2012, Park Ranger Frank Quinto observed Carstens operate a motorized all-terrain vehicle on the Town of Dune Acres beach, recover a personal water craft from the Lake Michigan water, load it on a trailer, and with the all-terrain vehicle pull the trailer and water craft away from the shoreline on and over the beach.

17. On the same date at another time, Park Ranger Quinto observed Carstens operate the personal water craft in the Lake Michigan water within 300 feet of the shoreline (about 10 feet from the shoreline).

18. After Park Ranger Quinto consulted with his supervisor Chief Ranger Bremer, Quinto issued three written citations to Carstens.

19. Within the boundaries of the Park are parcels of land owned by the United States and parcels of land owned by private individuals and entities.

20. The legal description of the boundaries of the Park excludes the Town of Dune Acres, setting the northern boundary of the Town of Dune Acres at "the toe of the dunes." Tr. Ex. 2B.

21. The toe of a dune is the point where the slope of the dune meets the gentler slope of the beach.

22. Therefore, the beach area between the toe of the dunes and water edge of Lake Michigan north of the Town of Dune Acres lies within the boundaries of the Park and is not a part of the Town of Dune Acres; this is the area in which Carstens operated a motorized all-terrain vehicle and towed a trailer and personal water craft on the beach.

\*3 23. At the beach area contiguous to the Town of Dune Acres, the toe of the dunes and the Lake Michigan ordinary high water mark are approximately the same location.

24. According to the Indiana "public trust doctrine," the beach area between the ordinary high water mark and the edge of the water of Lake Michigan (the land within the Park boundaries) is public land not owned by any person, entity, or municipality.

25. In 1978, the Governor of Indiana ceded to the National Park Service concurrent criminal jurisdiction over all lands within the boundaries of the Park. Tr. Ex. A.

26. The National Park Service also has jurisdiction to regulate (and to enforce its regulations concerning) activities on the water of Lake Michigan within 300 feet of the lake shore adjacent to Park boundaries.<sup>1</sup>

27. Lake Michigan is a navigable waterway subject to regulation by the United States federal government.

## CONCLUSIONS OF LAW

28. The Indiana Dunes National Lakeshore (the "Park") was created by federal statute. 16 U.S.C. § 460u.

29. The federal statute incorporates by reference the Park's boundary map on file at the office of the Director of the National Park Service, Department of the Interior.

30. The United States Secretary of the Interior is authorized to promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the national park system. 16 U.S.C. § 1a-2(h) provides:

In order to facilitate the administration of the national park system, the Secretary of the Interior is authorized, under

such terms and conditions as he may deem advisable, to carry out the following activities:

...

(h) Regulations; promulgation and enforcement Promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: *Provided*, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.

31. 36 C.F.R. § 3.8 prohibits launching a water vessel at any place other than a designated launching site within the Park's boundaries.

32. Under 36 C.F.R. § 3.9, the National Park Service prohibits the use of personal water craft within the Park's boundaries.

33. 36 C.F.R. § 4.10 prohibits the operation of a vehicle off road within the Park's boundaries except in designated off-road areas.

[2] 34. Navigable waters in the United States are under the exclusive control of the federal government, and Lake Michigan is one of the waters of the United States. *Owen v. United States*, 851 F.2d 1404, 1408 (Fed.Cir.1988) (en banc).

35. The physical limit of federal navigable waterways includes within the navigable waterways the land below the ordinary high water mark. *United States v. Chi., Milwaukee, St. Paul, & Pac. R.R. Co.*, 312 U.S. 592, 596-7, 61 S.Ct. 772, 85 L.Ed. 1064 (1941).

\*4 36. 36 C.F.R. § 1.2(a)(3), as amended, provides:

(a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

...

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without

regard to the ownership of submerged lands, tidelands, or lowlands;

....

37. To regulate the use of lands beneath navigable waters within state boundaries, among other things, Congress enacted the Submerged Lands Act. 43 U.S.C. § 1301 et. seq.

38. Submerged land, or "lands beneath navigable waters," is defined in the Act as "all lands ... covered by nontidal waters ... up to the ordinary high water mark...." 43 U.S.C. § 1301(a).

39. "Congress clearly has the power under the Commerce Clause to regulate the use of Landholders' submerged riparian property for conservation purposes and has not given up this power in the Submerged Lands Act." *Zabel v. Tabb*, 430 F.2d 199, 206 (5th Cir.1970).

40. The land between the edge of the water of Lake Michigan and the ordinary high water mark is held in public trust by the State of Indiana. *Ill. Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892); *Lake Sand Co. v. State*, 68 Ind.App. 439, 120 N.E. 714 (1918).

41. The boundaries of national parks include within them federal, state, and privately owned property without regard to ownership, not just federally owned land. *Free Enter. Canoe Renters Ass'n of Missouri v. Watt*, 711 F.2d 852, 856 (8th Cir.1983).

## ANALYSIS

[3] 42. The acts committed by Carstens on March 21, 2012, resulting in Citation 3111101 (Operating A Vehicle Off Designated Route) and Citation 3111102 (Launching A Water Craft At An Unauthorized Launch Site) occurred on the beach area between the toe of the dunes (which is also the Lake Michigan ordinary high water mark) and the edge of Lake Michigan's water.

43. That is the beach area between the north boundary of the Town of Dune Acres and the edge of the Lake Michigan water; it is not owned by any person, entity, or municipality; it is land held in the public trust by the State of Indiana.

44. The activities of Carstens at the beach area on March 12, 2012, constituted "boating and other activities on or relating to waters located within areas of the National Park System." 16 U.S.C. § 1a-2(h).

45. The National Park Service had and has jurisdiction to regulate that beach area and properly had and has legal jurisdiction to enforce its regulations at that beach area.

46. Carstens' launch of a water craft into Lake Michigan where there was no authorized launch site was in violation of 36 C.F.R. § 3.8.

47. Carstens' operation of an all-terrain vehicle on the beach area within the Park boundaries towing the personal water craft on a trailer where there was no designated route was in violation of 36 C.F.R. § 4.10.

## CONCLUSION

\*5 48. The Court finds that the Government's evidence on Citations 3111101 and 3111102 is sufficient to sustain convictions; the Court finds that a rational trier of fact can find the essential elements established beyond a reasonable doubt.

49. Accordingly, the Defendant's Motion For Acquittal filed September 13, 2013, is hereby **DENIED**.

50. The Court will by separate notice set a telephonic Scheduling Hearing for the purpose of scheduling the conclusion of the Bench Trial begun on July 26, 2013.

## Footnotes

1 In 1976, the boundary of the Park was amended to include a 300-foot strip into Lake Michigan. 16 U.S.C. § 460u, 1976 amend.

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***LBLHA, LLC, et al v. Town of Long  
Beach, LaPorte Circuit Court, Cause No.  
46C01-1212-PL-1971***

STATE OF INDIANA       )  
                                  )SS:  
COUNTY OF LAPORTE    )

LAPORTE CIRCUIT COURT

2013 TERM

CAUSE NO. 46C01-1212-PL-1941

LBLHA, LLC, MARGARET L. WEST,    )  
and DON H. GUNDERSON,            )  
                                  Plaintiffs,    )

v.                                    )

TOWN OF LONG BEACH, INDIANA,    )  
                                  Defendant.    )

\*\*\*\*\*

ALLIANCE FOR THE GREAT LAKES    )  
and SAVE THE DUNES;             )  
                                  Intervenor Defendants,    )

LONG BEACH COMMUNITY            )  
ALLIANCE, PATRICK                )  
CANNON, ROGER GANSAUER,         )  
DAVID OEI, BERNARD RABINOWITZ,   )  
and JOAN SMITH,                  )  
                                  Intervenor Defendants.    )

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ORDER AND PARTIAL SUMMARY JUDGMENT

This matter is before the Court on the Motion for Declaratory Summary Judgment filed by Plaintiffs LBLHA, LLC, Margaret L. West, and Don H. Gunderson and the Cross-Motion for Summary Judgment filed by the Town of Long Beach. The Court heard argument on the motions on October 17, 2013. The Court, having taken the matter under advisement, now FINDS and ORDERS as follows:

## FACTS

1. The facts surrounding this dispute are largely undisputed, and the parties have focused their memorandums and arguments on their respective interpretations of the relevant case law.
  2. Ms. West owns the property rights associated with lots 194 and 196, and Mr. Gunderson has ownership rights in lots 240, 242 and 244. The deeds to these lots are based on and cite to the Long Beach Plat and the Long Beach Elysium Plat. All of the lots involved in this dispute abut Lake Michigan.
  3. The Indiana Department of Natural Resources ("IDNR") posted a discussion concerning navigable waterways and ordinary high watermarks on their website. The discussion claimed the State of Indiana "owned" property abutting Lake Michigan below the ordinary high watermark. On October 10, 2012, the IDNR changed the posted discussion concerning navigable waterways and ordinary high watermarks. The change to the posted discussion stated, "The ordinary high watermark is the line on Lake Michigan and other navigable waterways used to designate where regulatory jurisdiction lies and in certain instances to determine where public use and ownership begins and/or ends."
- 
4. In July 2010, the Town of Long Beach ("Town") passed Resolution 10.002. The Town recognized and accepted the position of the IDNR that the dividing line on Lake Michigan between state and non-state ownership was the ordinary high watermark. Further, Resolution 10.002, section 3, stated, "The Long Beach Police Department shall only enforce PRIVATE PROPERTY ORDINANCES between Lake Shore Drive and Lake Michigan in the following locations: A. The entire length and width of all publicly owned beach accesses above the elevation of 581.5 feet. B. The entire length and width of all lots owned by the Town of Long Beach, Indiana, above the elevation of 581.5 feet." Finally, Resolution 10.002, section 4, stated, "The Long Beach Police Department shall continue to enforce all state and local statutes, ordinances, rules and regulations within its jurisdiction subject to the specific provisions of this policy."

5. After IDNR changed their position regarding ownership of property below the ordinary high watermark in October 2012, the Town passed Resolution 12-003 to reflect the changes made by IDNR. Resolution 12-003 recognized and accepted the position of the IDNR that the dividing line on Lake Michigan where the state's regulatory jurisdiction lies and, in certain instances, to determine where public ownership or use begins and/or ends was the ordinary high watermark. After section 1, sections 2, 3 and 4 of Resolution 12-003 mirrored sections 2, 3 and 4 of Resolution 10.002.

### ANALYSIS

1. Given the preceding facts, the Court finds that the Resolution passed by the Town is not a claim adverse to the Landowners' property rights nor does it constitute a taking. The Resolution is merely a statement of policy and does not speak to ownership of the land under discussion.
2. The Resolution in question is Resolution 12-003. In Indiana, the ordinary rules of statutory construction apply. That is, an ordinance must be interpreted as a whole, giving all words their plain, ordinary and usual meaning. *Weida v. City of West Lafayette*, 896 N.E.2d 1218, 1223 (Ind. Ct. App. 2008). In Resolution 12-003, the Town of Long Beach adopts the State of Indiana Department of Natural Resources (IDNR) position regarding the elevation of the ordinary high water mark and acknowledges the IDNR's authority to regulate with respect to certain beachfront property in Long Beach. Resolution 12-003 states, in pertinent part, "The Town of Long Beach, Indiana, recognizes and accepts the Indiana Department of Natural resources' position as reflected in its publications...the ordinary high watermark is the line on Lake Michigan used to designate where the state's regulatory jurisdiction lies and in certain instances, to determine where public ownership or use begins and/or ends."
3. Within the four corners of the document, nowhere does the Town assert any ownership of any land, nor does the Town take a position relative to the ownership of any specific

parcels. Given what Resolution 12-003 actually says, it is clear that the Resolution is nothing more than an expression of policy, agreeing with the statements made by the IDNR and acknowledging the IDNR's regulatory authority on certain property adjacent to Lake Michigan.

4. Statements made outside of a Town Council meeting are ineffective in interpreting Resolution 12-003. Indiana courts have made it clear that a municipal entity speaks only through its duly adopted resolution and ordinances and that "the only competent evidence of any act or proceeding of a municipal body, upon which the members of a corporate board are required to vote, is the record of proceedings." Thus, any statements made outside the context of the minutes of a meeting or an ordinance are not relevant. Plaintiffs cite to e-mails made by a Town Council member, however, the case law indicates that these are not relevant to demonstrating the intent of the Town in passing Resolution 12-003 or to interpret the meaning of the Resolution. In *Scott v. City of Seymour*, the court states, "It is well-settled in Indiana that boards and commissions speak or act officially only through the minutes and records made at duly organized meetings...The actions of individual members of a board or commission outside a meeting cannot be substituted for the actions at a duly constituted meeting or for the minutes thereof." *Scott v. City of Seymour*, 659 N.E.2d 585, 590 (Ind. Ct. App. 1995).

- 
6. Likewise irrelevant are the statements attributed to the Clerk-Treasurer and the Town Attorney. The Clerk-Treasurer is not even a member of the Town Council and any statements he made do not indicate the Town's position regarding Resolution 12-003. The Town Attorney's letter refers to the enforcement of Public Property Ordinances, which are defined by the Town Code as those ordinances "designed to regulate or prohibit activity on public and/or Town property". The Town Attorney does not refer to any Private Property Ordinances and the letter is not relevant to demonstrate the intent of the Town Council concerning Resolution 12-003.

7. Finally, the surveys of Town lots performed in 1984 by Charles Hendricks do not delineate the northern boundary of the lots. The only monuments depicted on the surveys

are the eastern and western boundaries of the road easements. The surveys appear to be limited to defining the road easements and to seeing if there are any encroachments thereon. They do not demonstrate any taking by the Town, nor are they relevant to demonstrate the intent of the Town Council concerning Resolution 12-003.

8. Historically, there has been some discussion of the ownership of the land between the ordinary high water mark and the shore in Indiana state and federal case law. However, most of the discussion has been in dicta or has dealt with issues tangential but that were not dispositive. In *Lake Sand Co. v. State*, the Court ruled that the bed of the lake, that is, the land covered by the water of Lake Michigan is held in trust by the state for the citizens of the state. *Lake Sand Co. v. State* 68 Ind. App. 439, 446 (1918). *Lake Sand* stated, "The state in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan". *Id.* The United States District Court for the Northern District of Indiana continued this line of reasoning in *Garner v. Michigan City*. The *Garner* Court stated that "Congress, in 1953, enacted the Submerged Lands Act whereby the federal government quit-claimed title to all lands beneath navigable waters within state boundaries to the various states, reserving in the federal government authority over such lands and waters for the purposes of navigation...By virtue of 43 U.S.C., Section 1301(a) the State of Indiana acquired title up to the ordinary high water mark." *Garner v. Michigan City*, 453 F. Supp. 33, 35 (N.D. Ind. 1978). Now, a much more recent case has come to light; namely, *United States v. Carstens*. *Carstens* states, "According to the Indiana "public trust doctrine", the beach area between the ordinary high water mark, and the edge of the water of Lake Michigan is public land not owned by any person, entity, or municipality." *United States v. Carstens* 2013 U.S. Dist. LEXIS 169079 (2013). *Carstens* goes on to state that "The land between the edge of the water of Lake Michigan and the ordinary high water mark is held in public trust by the State of Indiana." *Id.*
9. This Court does not reach the question of ownership over the land between the ordinary high water mark and the shore, since the Court finds that there has been no taking. In this instance, the Court feels that the matter of ownership is a pure question of law. As such, it

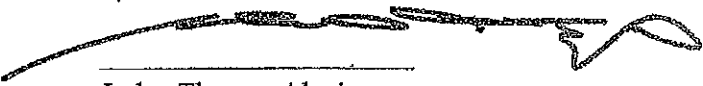
is more properly dealt with by the Indiana Legislature and/or an appellate court in a matter where the State of Indiana is a party.

### CONCLUSION

In conclusion, this Court finds that there was no taking by the Town of Long Beach. The Resolution passed by the town was a statement of policy and was not a claim adverse to any property right that the plaintiffs may or may not have in the land between the shore and the ordinary high water mark.

**IT IS THEREFORE ORDERED, ADJUDICATED AND DECREED** by the Court that Plaintiff's Motion for Summary Judgment with respect to Count 1 is **DENIED**. Defendant's Motion for Summary Judgment with respect to Count 1-4 is **GRANTED**. There being no further cause for delay, the Court enters judgment for Defendant Town Of Long Beach in Counts 1-4 of Plaintiff's Complaint.

**SO ORDERED** this 26th day of December, 2013.

  
\_\_\_\_\_  
Judge Thomas Alevizos  
LaPorte Circuit Court

Cc: Michael V. Knight, attorney for the plaintiff, 100 North Michigan Street, South Bend, IN 46601  
Lester Lukman, attorney for the defendants, 107 Broadway Ave, Chesterton, IN 46304  
W. William Weeks, Counsel for Intervenor-Defendants, 116 S. Indiana Ave., Bloomington, IN 47408  
James Olson, Counsel for Intervenor-Defendants, 420 E. Front Street, Traverse City, MI 49686  
Kurt Earnst, Counsel for Intervenor-Defendants, P.O. Box 1006, Michigan City, IN 46361  
File clerk/  
/njl